Supreme Court, U. S.
FILED
JUN 9 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

NO. 79-1808

ROBERT VERNE BONFOEY,
Petitioner,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STANLEY E. NEELY
LARRY M. LESH
LOCKE, PURNELL, BOREN,
LANEY & NEELY
(A Professional Corporation)
3600 Republic National Bank Tower
Dallas, TX 75201 (214) 746-7400
Attorneys for Respondent

INDEX OF AUTHORITIES

Page

CASES

Aetna Ins. Co. v. Pete Wilson Roofing & Heating Co., Inc., 272 So.2d 232 (Ala. 1972) 5

Bishop v. Wood, 426 U.S. 341 (1976) 9

Blue Cross-Blue Shield of Alabama v. Thornton, 325 So.2d 187 (Ala. Civ. App. 1975) 5, 6

Johnson v. Shenandoah Life Ins. Co., 281 So.2d 636 (Ala. 1973) 4

Lehman Bros. v. Schein, 416 U.S. 386 (1974) 7

Liberty National Life Ins. Co. v. Staggs, 6 So.2d 432 (Ala. 1942) 3, 5, 6

Pearson v. Agricultural Ins. Co. of Watertown, N.Y., 25 So.2d 164 (Ala. 1946) 4

Security Life & Trust Co. v. Galin, 193 So.2d 766 (Ala. 1966) 3

State of Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 226 (5th Cir. 1976) 7

United States Fidelity and Guaranty Co. v. McKinnon, 356 So.2d 600 (Ala. 1978) 6, 7

TABLE OF CONTENTS

	Page
OPINIONS, STATUTES AND JURISDICTION	1
QUESTION PRESENTED	2
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	2
REASONS FOR DENYING THE WRIT	3
1. The state law applicable to the case at bar is clear and well established, and was fairly and accurately applied by the Court of Appeals	3
2. The Fifth Circuit correctly exercised its discretion in denying Bonfoey's request for certification	7
3. It is irrelevant to the certification process that the federal court does not sit in the state whose law is to be applied	8
CONCLUSION	10
CERTIFICATE OF SERVICE	10

IN THE

Supreme Court of the United States

October Term, 1979

NO. 79-1808

ROBERT VERNE BONFOEY,

Petitioner,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To: THE HONORABLE SUPREME COURT OF THE UNITED STATES

Respondent, The Equitable Life Assurance Society of the United States (hereinafter called "Equitable"), presents this its Respondent's Brief in Opposition to the Petition for Writ of Certiorari of Petitioner, Robert Verne Bonfoey (hereinafter called "Bonfoey").

OPINIONS, STATUTES AND JURISDICTION

The opinions of the courts below, the statutes involved in this case, and the jurisdiction of the Court are contained in Bonfoey's Petition.

QUESTION PRESENTED

Bonfoey contends that the state law applicable to the case at bar is uncertain[1] because of a conflict created by two recent Alabama court decisions.[2] The decisions cited, however, are neither applicable to the case at bar nor in conflict with the established state law. Therefore, the question presented to this Court should be: When in a diversity suit a circuit court of appeals is requested to certify to a state supreme court, pursuant to a state certification statute, certain legal questions which are settled by the courts of that state, is it an abuse of the circuit court of appeals' discretion to deny the request?

STATEMENT OF THE CASE

Bonfoey's statement of the case is substantially correct.

STATEMENT OF THE FACTS

Equitable adopts the facts as contained in the opinion of the Court of Appeals for the Fifth Circuit as the correct statement of facts and presents the following fact summary from that opinion for purposes of emphasis and clarification.[1]

Under the terms of the Unionmutual policy for which Equitable had assumed responsibility, Bonfoey could not recover for his disability.[2] Nevertheless, Bonfoey sought recovery alleging that officers of Jack's, acting as agents for Unionmutual, had waived the "waiting

---

[1] Bonfoey's Petition, pg. 2.

[2] Bonfoey's Petition, pg. 6.

[1] The opinion of the Circuit Court of Appeals is printed in the Appendix A of the Petition.

[2] Pet. App. A; pg. A-4.

period" and "actively at work" conditions.[3] Bonfoey made this contention even though: 1) The officers of Jack's had, at most, authority to collect premiums and administer the policies;[4] 2) neither insurance company had conducted itself in a manner which would suggest that the officers of Jack's possessed any greater authority;[5] and 3) the Unionmutual policy had expressly stated that no agent had authority to change or waive any provision of the policy.[6]

REASONS FOR DENYING THE WRIT

1. *The state law applicable to the case at bar is clear and well established, and was fairly and accurately applied by the Court of Appeals.*

Under established Alabama law, the coverage of an insurance policy cannot be modified or enlarged by an agent of the insurer who does not have the requisite authority to make such a change. *Security Life & Trust Co. v. Galin*, 193 So.2d 766 (Ala. 1966). As the Supreme Court of Alabama stated in *Liberty National Life Insurance Co. v. Staggs*, 6 So.2d 432 (Ala. 1942):

> We have recognized the general rule that an agent whose authority is limited to soliciting insurance, delivering policies and collecting premiums has no power to change stipulations in a contract of insurance; to do so he must be either a general agent or be specifically authorized or his course of dealing to that extent have been ratified expressly or impliedly.

---

[3] *Id.* at pg. A-3.
[4] *Id.* at pg. A-5.
[5] *Id.*
[6] *Id.*

6 So.2d at 433. Thus, under Alabama law, an agent's ability to alter a contract of insurance is directly dependent upon the authority he possesses.

Equally well settled in Alabama is the principle that an agent's apparent authority is determined by the conduct of the principal, rather than the acts of the agent. *Pearson v. Agricultural Ins. Co. of Watertown, N.Y.*, 25 So.2d 164 (Ala. 1946). In *Johnson v. Shenandoah Life Ins. Co.*, 281 So.2d 636 (Ala. 1973), the Alabama Supreme Court stated the rule as follows:

> The doctrine of apparent authority does not rest upon what one thinks an agent's authority may be, or what the agent holds out his authority to be; rather, the doctrine of apparent authority is based on the principal's holding the agent out to a third person as having the authority under which he acts . . .
>
> The apparent power of an agent is to be determined by the acts of the principal, and not the acts of the agent; a principal is responsible for the acts of an agent within his apparent authority only where the principal by his acts or conduct has clothed the agent with the appearance of authority, and not where the agent's own conduct and statements have created the apparent authority . . .

281 So.2d at 640.

In the case at bar, the officers of Jack's, at most, had authority to collect premiums and administer the policies. No conduct was shown which would suggest that either Unionmutual or Equitable clothed these officers with greater authority. To the contrary, the Unionmutual policy expressly stated that no agent had authority to waive any of the provisions of the insurance

contract. The case at bar therefore, falls squarely within the rule announced in *Staggs, supra:*

> An agent whose authority is limited to soliciting insurance, delivering policies and collecting premiums has no power to change stipulations in a contract of insurance . . .

6 So.2d at 433. Thus, the Fifth Circuit correctly ruled, on the basis of well established state law, that the officers of Jack's had no actual or apparent authority to waive the "waiting period" or "actively at work" requirements of the policy. Moreover, the Fifth Circuit's holding is consistent with the established principle in Alabama law that coverage under an insurance policy cannot be enlarged or expanded on theories of waiver and estoppel. *Aetna Ins. Co.* v. *Pete Wilson Roofing & Heating Co., Inc.*, 272 So.2d 232 (Ala. 1972).

Bonfoey contends, however, that two recent state court decisions create doubt with regard to the applicable state law involved in the case at bar.[1] The argument is without merit because neither decision is applicable.

In *Blue Cross-Blue Shield of Alabama v. Thornton*, 325 So.2d 187 (Ala. Civ. App. 1975), the court found, on the basis of the insurer's acquiescence, that an employer holding a group insurance plan for the benefit of his employees had authority to collect and forward employee premiums to the insurer.[2] The court concluded that since the employer had authority to collect these premiums, the insurer was estopped from denying coverage to an employee who had paid the premium to his employer, but the employer had failed to forward the premium to the insurer.[3] Thus, *Thornton* stands for

---

[1] Pet., pg. 6.

[2] 325 So.2d at 191-192.

[3] *Id.* at 193.

the proposition that an agent with apparent authority to perform certain acts can bind his principal when he acts within that authority. In the case at bar, the officers of Jack's only had authority to collect premiums and administer the policies. Such authority clearly did not encompass the waiving of policy provisions. Therefore, *Thornton* is inapplicable because the officers of Jack's did not act within their apparent authority.

In *United States Fidelity and Guaranty Co. v. McKinnon*, 356 So.2d 600 (Ala. 1978), the second case cited by Bonfoey,[4] a local insurance agent working out of the insurer's branch office told the "insured," with knowledge that the "insured" was not covered by the policy, that she was included in the coverage. Affirming the jury findings in the lower court, the Supreme Court of Alabama stated that "an agency relationship" existed between the insurer and the local agent; that the knowledge possessed by the local agent was therefore "imputed" to the insurer;[5] and that, on the basis of this agency relationship, the insurer was estopped from denying coverage to the "insured."[6] *McKinnon* is accordingly based on a theory that a general agency relationship existed between the employee of the local agency and the insurer, and as a consequence, it would be within the local agent's authority to make representations of coverage.

Such a theory is consistent with the established Alabama law stated in *Liberty National Life Ins. Co. v. Staggs, supra:*

---

[4] Pet. pg. 6.

[5] 356 So.2d at 606.

[6] *Id.*

> . . . to change stipulations in a contract of insurance [the agent] . . . must be either a general agent or be specifically authorized or his course of dealing to that extent have been ratified expressly or impliedly.

6 So.2d at 433.

In the case at bar, the officers of Jack's were not general agents of Unionmutual or Equitable; they were, at most, special agents with limited authority. The *McKinnon* holding, dealing with general agency, is therefore inapplicable.

In short, the Alabama law applicable to the case at bar is clear and well settled. The Fifth Circuit appropriately applied the correct law, and in doing so, fulfilled the requirements established by this Court in *Erie*.[7]

2. *The Fifth Circuit correctly exercised its discretion in denying Bonfoey's request for certification.*

This Court stated in *Lehman Bros. v. Schein*, 416 U.S. 386 (1974), that the use of a state's certification statute "rests in the sound discretion of the federal court."[8] The opinion in that case suggested that such factors as the novelty of the question, the clarity of the local law, the concept of federalism, and the saving of time, energy, and resources should be considered in determining whether certification would be appropriate.[9]

In *State of Florida ex rel. Shevin v. Exxon Corporation*, 526 F.2d 226 (5th Cir. 1976), an opinion completely consistent with *Lehman, supra*, the Fifth Circuit wrote:

---

[7] Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

[8] 416 U.S. at 391.

[9] *Id.* at 391-392.

> In determining whether to exercise our discretion in favor of certification, we consider many factors. The most important are the closeness of the question and the existence of sufficient sources of state law — statutes, judicial decisions, attorney general's opinions — to allow a principled rather than conjectural conclusion. But also to be considered is the degree to which considerations of comity are relevant in light of the particular issue and case to be decided. And we must also take into account practical limitations of the certification process: significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court.

526 F.2d at 274-275.

Application of the foregoing principles establishes that the case at bar clearly was not appropriate for certification. First, the legal questions at issue were neither novel nor close. Second, because Alabama law is clear and well established, the lower courts could readily determine the applicable state law without violating traditional notions of comity and federalism. Finally, from a practical standpoint, the certifying process would have only served to increase delay[10] and the expenditure of resources by both the courts and the litigants.

Thus, the case at bar completely lacked the necessary elements for certification, and the Fifth Circuit correctly exercised its discretion in denying Bonfoey's certification request.

3. *It is irrelevant to the certification process that the federal court does not sit in the state whose law is to be applied.*

[10] This Court has emphasized the use of the certification procedure as a tool to speed up the termination of the proceeding. Bellotti v. Baird, 428 U.S. 132 (1976).

Because certification lies within the federal court's discretion[11] and may be ordered on the court's own motion,[12] the domicile of the federal court is unimportant; it is free to order certification whenever the state law is unsettled, unfamiliar or not readily determinable. Therefore, Bonfoey's suggestion that federal courts outside the state whose law is to be applied should be free to order certification[13] is meaningless; such is already the case, and no conflict among the circuits is alleged. Moreover, Bonfoey's citation of *Bishop v. Wood*, 426 U.S. 341 (1976), for the proposition that this Court favors certification by out-of-state federal courts,[14] is incorrect. The *Bishop* case does not even mention certification.

---

[11] Lehman Brothers v. Schein, 416 U.S. 386, 391 (1974).

[12] Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §4248 (1978).

[13] Pet. pg. 7-8.

[14] Pet. pg. 7.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be denied.

Respectfully submitted,

LARRY M. LESH
LOCKE, PURNELL, BOREN,
LANEY & NEELY
(A Professional Corporation)
3600 Republic National Bank Tower
Dallas, TX 75201 (214) 746-7400
Attorneys for Respondent The Equitable Life Assurance Society of the United States

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been forwarded to opposing counsel, G. Frank Brown, 2001 Bryan Tower, Suite 3120, Dallas, TX 75201, by U.S. Mail on this the 6 day of June, 1980.

LARRY M. LESH